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No. 95-1694

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1996

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THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, *et al.*,
*Petitioners,*

v.

JOHN DOE, *et al.*,
*Respondents.*

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**On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

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## BRIEF OF THE NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL GOVERNORS' ASSOCIATION, NATIONAL ASSOCIATION OF COUNTIES, NATIONAL LEAGUE OF CITIES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, U.S. CONFERENCE OF MAYORS, AND COUNCIL OF STATE GOVERNMENTS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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## QUESTION PRESENTED

Whether an entity, which otherwise would be considered part of the State or an arm of the state and thereby immune from suit in federal court under the Eleventh Amendment, may lose its immunity where it has a claim for reimbursement or indemnity from the federal government or other third party.

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### INTEREST OF THE *AMICI CURIAE*

*Amici*, organizations whose members include state and local governments and officials throughout the United States, have a compelling interest in legal issues that affect state and local governments. This

case raises an issue of fundamental importance to *amici* and their members—whether a state entity can be denied its Eleventh Amendment immunity from suit in federal court because the entity may receive indemnification from the federal government or other third parties for any judgment entered against it.

The Eleventh Amendment is one of the principal constitutional protections of state sovereignty. It serves a far broader purpose than merely protecting the state treasury from the impact of money judgments awarded by the federal courts. " 'The very object and purpose of the 11th Amendment were to prevent the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties.' " *Puerto Rico Aqueduct and Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993) (quoting *In re Ayers*, 123 U.S. 443, 505 (1887)). It thus preserves a zone of federal court non-interference for the States in the administration of governmental functions by providing an immunity from suit and not just a defense to liability. *Id.*

The court of appeals' decision subverts this purpose by holding that the University of California, an entity which that court has previously recognized as being an arm of the state was not so in this case solely because it may be indemnified by a third party. Taken to its logical conclusion, this theory would subject state entities to federal court suits whenever an entity receives funds from a source other than the state treasury, with attendant discovery in every suit to determine the sources of the entity's funds. This would, of course, be wholly at odds with the Eleventh Amendment's purpose of providing the States with an immunity from suit in federal court.



Because of the importance of this issue to *amici* and their members, this brief is submitted to assist the Court in its resolution of this case.[1]

## STATEMENT

*Amici* adopt petitioners' statement.

## SUMMARY OF ARGUMENT

1. The Ninth Circuit has previously held that the University of California is an arm of the state which is entitled to Eleventh Amendment immunity. *See, e.g., Thompson v. City of Los Angeles*, 885 F.2d 1439, 1443 (9th Cir. 1989). The court nonetheless held that in this case the University is not entitled to Eleventh Amendment immunity because it may be indemnified by the United States for any money judgment entered against it.

The judgment below subverts the Eleventh Amendment and should be reversed. As this Court has made clear, "the Eleventh Amendment does not exist solely to prevent federal court judgments that must be paid out of a State's treasury." *Seminole Tribe of Florida v. Florida*, 116 S. Ct. 1114, 1124 (1996) (citations omitted). Rather, the Eleventh Amendment serves the greater purpose of protecting state autonomy by providing an immunity from suit in federal court. By allowing this suit to go forward, the court of appeals has subjected the State to the "coercive process[es]" of a federal court and the "indignity" of having to defend itself there against this suit. *In re Ayers*, 123 U.S. 443, 505 (1887). Its judgment thus violates the Eleventh Amendment.

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[1] The parties have consented to the filing of this brief *amicus curiae*. Letters indicating their consent have been filed with the Clerk of the Court.

The court of appeals' holding is also highly problematic. Contrary to the court's view, it is not certain that the United States will pay any judgment awarded against the University. The indemnification clause specifically exempts the United States from paying damages caused by "bad faith or willful misconduct" of the University's officers. Pet. App. 36a. Given the nature of Doe's claims, it is possible that the United States would resist indemnification as outside the scope of the clause. Moreover, as required by the Anti-Deficiency Act, 31 U.S.C. § 1341, the United States' obligation is contingent on Congress appropriating sufficient funds. There is thus a very real possibility that the State itself, which remains legally liable for any judgment, will be forced to pay the judgment.

The court of appeals' holding is also troublesome because it has no identifiable stopping point. Taken to its logical conclusion, it sanctions federal court suits against the States whenever (and discovery at the least to determine whether) a state entity has some source of funds other than the state treasury from which to pay a judgment. Moreover, the determination of whether a judgment will be paid by sources other than the state treasury will frequently require a high degree of speculation on the part of the federal courts. The very process of making this determination would, of course, eviscerate much of the Eleventh Amendment's principal purpose of providing the States with an immunity from suit in federal court. It also creates uncertainty; as this case illustrates, the same entity might retain its immunity in some cases but not in others. The court of appeals' indemnification rationale is untenable and its judgment should be reversed.



2. The court of appeals' opinion is no more persuasive if it is viewed more generally as setting forth numerous factors for determining whether an entity "is more like a county or city than it is like an arm of the State." *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977). The first of these factors, whether a judgment will affect the state treasury, is too inherently unworkable a criterion to provide probative guidance in determining whether an entity is an arm of the state. Moreover, because most States have longstanding constitutional limitations on the amount of their indebtedness, those important governmental programs which require large amounts of capital spending are generally carried out by authorities and corporations which are nominally independent of the State's executive department. These entities, however, do not in any sense resemble local governments which are not entitled to Eleventh Amendment immunity. To suggest that such entities are not entitled to Eleventh Amendment immunity because the State is technically not liable for any judgment is to ignore that they perform important governmental programs on behalf of the State and that any federal court judgment will affect the entity in its performance of these functions.

The court of appeals' multi-factor test for assessing whether an entity is an arm of the state is indeterminate and relies on criteria which are of little probative value. There are, for example, no judicially manageable standards for determining whether an entity is performing local as opposed to central government functions. The remaining factors, such as whether the entity has the power to sue and be sued, hold property, or has been given corporate status, do

not establish that an entity is not an arm of the state.

The determination of whether an entity "is more like a county or city than it is like an arm of the State" should instead focus on political control. Where the state government appoints a majority of an entity's governing officials, the entity is surely an arm of the state. Analyzed under the proper standard, the University of California is entitled to Eleventh Amendment immunity in this case.

## ARGUMENT

### THE UNIVERSITY OF CALIFORNIA IS ENTITLED TO ELEVENTH AMENDMENT IMMUNITY IN THIS CASE

Notwithstanding its prior precedents holding that the University of California is an arm of the state and thus entitled to Eleventh Amendment immunity from suit in federal court, *see Thompson v. City of Los Angeles*, 885 F.2d 1439, 1443 (9th Cir. 1989); *BV Engineering v. University of Cal., L.A.*, 858 F.2d 1394, 1395 (9th Cir. 1988), *cert. denied*, 489 U.S. 1090 (1989), the court of appeals concluded that these "previous grants of immunity in contexts where the State of California is financially responsible for the University do not automatically translate into immunity in this unique situation." Pet. App. 9a. This was so, the court reasoned, because "[s]tate liability for [a] money judgment is the single most important factor in determining whether an entity is an arm of the state." *Id.* at 7a. According to the court of appeals, this factor weighed against the "granting" of Eleventh Amendment immunity in this case because the University's contract with the United



States "makes clear that the Department, and not the State of California, is liable for *any* judgment rendered against the University in its performance of the Contract." *Id.* (emphasis added).

As explained below, the court of appeals' approach is both erroneous and unworkable. It threatens to expose not only traditional state entities (such as colleges, universities and turnpike authorities) but also more modern agencies (such as community development authorities) to suit in federal court even when such entities are under the control of, and are directly accountable to, the State. *See, e.g., Durning v. Citibank, N.A.*, 950 F.2d 1419 (9th Cir. 1991) (Wyoming Community Development Authority not an arm of the state). Indeed, if an entity's potential ability to obtain indemnification or reimbursement from a source other than the state treasury is to be the *sine qua non* of the Eleventh Amendment, it is inevitable that agencies which are unquestionably arms of the state will be subjected to suits for money damages in federal court whenever a plaintiff can point to some potential source of funds to pay a judgment, such as the federal government or an insurer. *See, e.g., Bennett v. White*, 865 F.2d 1395, 1408 (3d Cir. 1989); *Brown v. Porcher*, 660 F.2d 1001, 1006-07 (4th Cir. 1981), *cert. denied*, 459 U.S. 1150 (1983).

This approach subverts the Eleventh Amendment. It also has no basis in the Court's cases. *See Brown*, 459 U.S. at 1153 (White, J., dissenting from denial of certiorari). This alone justifies reversing the court of appeals. Moreover, the multi-factor test used by the court of appeals for assessing whether an entity is an arm of the state is indeterminate and relies

on criteria which are of no probative value. The Court should therefore instruct the lower federal courts that in determining whether a state-created entity is to be deemed an arm of the state for Eleventh Amendment purposes, or a political subdivision which is not, *see Lincoln County v. Luning*, 133 U.S. 529 (1890), the proper inquiry is whether the State possesses sufficient control over the entity. Not only is this test simple and workable—in contrast to the test employed by the court of appeals—its standard embodies the values of sovereignty which the States unquestionably retained in forming the Union. *See, e.g., Seminole Tribe of Florida v. Florida*, 116 S.Ct. 1114, 1122 (1996); *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779 (1991); *Principality of Monaco v. Mississippi*, 292 U.S. 313, 322-24 (1934); *The Federalist* No. 81, at 455 (Alexander Hamilton) (Isaac Kramnick ed., 1987).

### A. The Potential To Obtain Indemnification From The Federal Government Or A Third Party Is Irrelevant In Determining Whether An Entity Is An Arm Of The State

In holding that the University of California should not be deemed to be an arm of the state in this case, the court of appeals relied on its view that the University's contract with DOE "makes clear that the [DOE] and not the State of California, is liable for any judgment rendered against the University in its performance of the Contract." Pet. App. 7a. Reasoning that "[s]tate liability for [a] money judgment is the single most important factor in determining whether an entity is an arm of the state," *id.*, the court concluded that the possibility that DOE



would indemnify the University in this case makes Eleventh Amendment immunity unavailable.

The court of appeals' holding is erroneous. It rests on an incomplete understanding of the purpose of the Eleventh Amendment. While the impact on a State's treasury is relevant in determining whether a suit nominally against an official is a suit against the State, *see, e.g., Edelman v. Jordan*, 415 U.S. 651, 668-69 (1974), this Court has long recognized that the purpose of sovereign immunity is far broader than the protection of the state treasury from money judgments.

The text of the Eleventh Amendment states:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

By its express terms, the Eleventh Amendment precludes the exercise of federal court jurisdiction over any suit against a State regardless of whether the relief sought is legal or equitable in nature. Notwithstanding that the Eleventh Amendment was prompted by this Court's decision in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), which upheld the exercise of federal jurisdiction over an action for money damages brought against a State, "[t]he Eleventh Amendment does not exist solely in order to 'preven[t] federal court judgments that must be paid out of a State's treasury.'" *Seminole Tribe*, 116 S.Ct. at 1124 (quoting *Hess v. Port Auth. Trans-Hudson Corp.*, 115 S.Ct. 394, 404 (1994)). Indeed, both the Amendment's text and a long line of cases make clear that it precludes the exercise of federal court jurisdiction over a suit against a State even when a money

judgment has not been sought. *See id.; see also Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100-102 (1984); *Missouri v. Fiske*, 290 U.S. 18, 27 (1933).

As this Court recently observed:

> [R]espondent's claim that the Eleventh Amendment confers only protection from liability misunderstands the role of the Amendment in our system of federalism: "The very object and purpose of the 11th Amendment were to prevent the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties." *In re Ayers*, 123 U.S. 443, 505 (1887). The Amendment is rooted in a recognition that the States, although a union, maintain certain attributes of sovereignty, including sovereign immunity. See *Hans v. Louisiana*, 134 U.S. 1, 13 (1890). It thus accords the States the respect owed them as members of the federation.

*Puerto Rico Aqueduct and Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993); *see also Seminole Tribe*, 116 S.Ct. at 1124.

These authorities squarely refute the court of appeals' conclusion that the University is not entitled to Eleventh Amendment immunity in this case because it may be indemnified by the United States for any money judgment awarded. To even get to that point, the University will of course have been subjected to the "coercive process[es]" of a federal court and the "indignity" of having to defend itself there against this suit. *In re Ayers*, 123 U.S. at 505. In this respect alone, the court of appeals' decision does not "accord[] the States the respect owed them as members of the federation." *Puerto Rico Aqueduct*, 506 U.S. at 146.



Moreover, a money judgment for Doe will be a judgment enforceable against the University regardless of whether it ultimately obtains indemnification from the United States. As Judge Canby explained below:

> No one has disputed that a judgment against the University of California is a legal obligation of the State of California. . . . The fact that California has a legal means of collecting an indemnity from the United States does not affect its primary liability for the judgment.

Pet. App. 13a (Canby, J., dissenting). Contrary to the analysis of the court of appeals, the State is liable for any money judgment awarded Doe.

The court of appeals' suggestion that federal courts have the power to "grant" or deny the University its Eleventh Amendment immunity depending upon the function engaged in, *see* Pet. App. 9a, is also refuted by this Court's cases. Contrary to the view of the court of appeals, the Constitution does not vest in the federal courts authority either to "grant" or deny Eleventh Amendment immunity to what is unquestionably a state entity. Rather, when a state entity asserts that it is immune from suit in federal court—and here the federal courts have previously recognized the University's immunity from suit in federal court, *see Thompson*, 885 F.2d at 1443; *BV Engineering*, 858 F.2d at 1395—the only questions for the court are whether the State has "specif[ied its] intention to subject itself to suit in *federal court*," *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 241 (1985), or whether Congress, acting within its constitutional authority, has "abrogate[d] the States' constitutionally secured immunity from suit in federal court . . .

by making its intention unmistakably clear in the language of the statute." *Id.* at 242.

Accordingly, while the existence of a state entity's immunity from suit in federal court can vary depending upon the function involved, *see, e.g.*, *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976) (upholding a federal court award of damages against a State under Title VII, 42 U.S.C. § 2000e *et seq.*), it is clear that this decision is for the States and/or Congress to make. Here, California has not waived its immunity from suit in federal court. Moreover, the relevant federal statute, 42 U.S.C. § 1983, does not abrogate California's Eleventh Amendment immunity. *See Edelman*, 415 U.S. at 674-77. To hold that the University is subject to suit in federal court amounts to no less than an end run around this Court's holdings in *Edelman* and *Atascadero*.

The court of appeals' indemnification theory is also fundamentally at odds with the Court's holding in numerous cases that a State's receipt of federal funds does not demonstrate that it has waived its immunity from suit in federal court. *See Atascadero*, 473 U.S. at 246-47 (Rehabilitation Act); *Florida Dep't of Health and Rehab. Servs. v. Florida Nursing Home Ass'n*, 450 U.S. 147, 148-50 (1981) (per curiam) (Medicaid); *Edelman*, 415 U.S. at 671-74 (Social Security Act provisions for Aid to the Aged, Blind, or Disabled). The indemnification clause in the contract between the University and the United States stands on similar footing as the various federal programs at issue in these cases: while it suggests that the State has recourse in the event a money judgment is awarded against it, it does not manifest any intent



by the State to subject itself to suit in federal court. *See* Pet. App. 36a-37a. Of further note, in these cases, the respective State, through its participation in the federal programs would likely have been able to receive at least partial reimbursement for any award of damages against it. The Court did not, however, analyze the respective provisions of federal law to determine whether the State was likely to receive reimbursement. Indeed, such an approach—like that adopted by the court of appeals here—is incompatible with the nature of Eleventh Amendment immunity, which as the Court has recognized, is an immunity from suit and not just a defense to liability. *See Puerto Rico Aqueduct*, 506 U.S. at 145-46 & n.5.

The court of appeals' reliance on the possibility of indemnification is also highly problematic as a practical matter. Contrary to the view of the court of appeals, it is uncertain whether "the Department, and not the State of California, [will] pay[] any judgment rendered against the University in its management of the Laboratory." Pet. App. 9a. *See id.* at 14a (Canby, J., dissenting) ("In this case, there is a relatively clear indemnity agreement, but does the United States have any defenses to a claim of indemnity?"). The indemnification clause specifically exempts the United States from its obligation for damages "caused directly by bad faith or willful misconduct on the part of" the officers of the University or "any person acting as Laboratory Director." Pet. App. 36a. Given the nature of Doe's claims, it is certainly possible that in the event the University is adjudged liable, the United States will resist indemnification as outside the scope of the clause.

Moreover, consistent with the Anti-Deficiency Act, 31 U.S.C. § 1341, the contract's indemnification clause specifically provides that the United States' obligations "shall be subject to the availability of funds appropriated from time to time by Congress." Pet. App. 37a. While the United States has pledged its "best effort to obtain such funds" when they are not available, its obligation to pay is nonetheless contingent on Congressional approval. *Id.*

There is thus a very real possibility that the State itself will be forced to pay the judgment, a result which would violate even the Ninth Circuit's crabbed view of the Eleventh Amendment. Indeed, it is likely that in this case the obligation of the United States to indemnify the State cannot even be resolved in the same forum because under the Tucker Act, the United States Claims Court has exclusive jurisdiction over any suit by the State seeking more than $10,000. *See* 28 U.S.C. §§ 1346(a)(2); 1491(a)(1). A State's immunity from suit in federal court should not be dependent upon the speculative prospect of obtaining indemnification from third parties.

The court of appeals' reasoning also has no identifiable stopping point. For example, does the rule apply only when the federal government has promised to indemnify a State? Or does it sanction federal court suits against a State whenever (and discovery at the least to determine whether) a state entity has insurance or a contract with a third party requiring indemnification? For that matter, should it be taken to its logical conclusion to sanction suits against a state entity whenever it has a source of revenue—such as tuition payments—which is "independent" of the state treasury? *Cf. Brown v. Porcher*, 660 F.2d at 1007 (rejecting State's Eleventh Amendment defense in suit for workers compensation benefits, reasoning that fund receipts consisted of employer contributions).



Moreover, in adjudicating the State's Eleventh Amendment defense, is the federal court to conduct a hearing as to the financial soundness of the third party? Certainly an insolvency or bankruptcy on the part of the indemnifier would result in a financial impact on the state treasury as the plaintiff enforces the judgment against the State and the State is directed to file its claim in the respective proceedings. And are the federal courts to assess the likelihood of the State receiving indemnification under the contract in light of the indemnifier's likely defenses, even though the indemnifier may not be subject to the jurisdiction of the court? *Cf.* Pet. App. 14a (Canby, J., dissenting).

The very process of determining whether the state treasury will be affected by a potential judgment would eviscerate much of the Eleventh Amendment's principal purpose of providing the States with an immunity from suit in federal court. *See Puerto Rico Aqueduct*, 506 U.S. at 146. The court of appeals' approach also injects an extraordinary level of complexity into what should be a relatively simple and straightforward inquiry. *Cf. Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 115 S. Ct. 1043, 1055 (1995) (emphasizing adverse "practical consequences" in rejecting complex jurisdictional inquiry). Not only is it a poor use of scarce judicial resources, it will lead to unpredictable outcomes. Indeed, as this case demonstrates, the same entity might retain its immunity in some cases but not in others. The Eleventh Amendment immunity is too

important to the functioning of our federal system, *see, e.g., Seminole Tribe*, 116 S.Ct. at 1124, to be subjected to such uncertainty and manipulation.

Given that the Ninth Circuit has previously held that the University is an arm of the state, *see Thompson*, 885 F.2d at 1443; *BV Engineering*, 858 F.2d at 1395, its reliance on the University's potential to receive indemnification is a remarkable basis upon which to conclude that it is not an arm of the state for purposes of this case. The Eleventh Amendment serves a greater purpose than simply shielding the state treasury from money judgments. Rather, it preserves a zone of federal court non-interference for the States in the administration of governmental functions. The University's potential entitlement to receive indemnification from outside the state treasury is irrelevant in determining whether it is an arm of the state.

### B. The Ninth Circuit's Multi-Factor Test For Determining Whether An Entity Is An Arm Of The State Is Unworkable

While the Ninth Circuit's indemnification rationale alone warrants reversal, the opinion below is no more persuasive when it is read more generally as setting forth numerous criteria for determining whether an entity "is more like a county or city [which is not entitled to the immunity] than it is like an arm of the State." *Mt. Healthy*, 429 U.S. at 280-81. Like the Ninth Circuit, some courts have deemed the state treasury's liability for a money judgment to be an important factor in determining whether an entity is an arm of the state. *See, e.g.*, Pet. App. 7a ("State liability for money judgment is the single most important factor in determining whether an entity is an arm of the state."); *see also* Alex E. Rogers, Note,



*Clothing State Governmental Entities With Sovereign Immunity: Disarray in the Eleventh Amendment Arm-of-the-State Doctrine*, 92 Colum. L. Rev. 1243, 1291-96 (1992). But a state treasury's liability for a money judgment is too inherently unworkable a criterion to provide probative guidance, let alone be "the single most important factor in determining whether an entity is an arm of the state." Pet. App. 7a.

For instance, is it merely the possibility that a judgment will have to be paid out of state funds that renders an entity an arm of the state? Or must the entity show that in all cases its judgments are paid by the state treasury? Or is it enough that the judgment is satisfied primarily with state funds? *Cf. Brown v. Porcher*, 660 F.2d at 1006-07. Must the State's liability be set forth in the entity's enabling legislation? Or do past instances in which the State has paid judgments against the entity suffice? If so, what if the State has paid some judgments but not others? The disparate use of the state treasury factor by the various courts of appeals demonstrates how unworkable it is as a criterion for determining whether an entity is an arm of the State. *See* Note, 92 Colum. L. Rev. at 1291-96.

Moreover, as the States respond to the ever-changing social and economic problems of their citizens, reliance on whether the state treasury will pay the judgment in order to determine whether an entity is entitled to Eleventh Amendment immunity is both shortsighted and anachronistic. In recent years, the States have created a wide variety of entities to respond to the needs of their citizens, including community development, business development, housing finance and medical finance authorities. *See, e.g.*,

*Durning*, 950 F.2d at 1421; Note, 92 Colum. L. Rev. at 1250-51 & nn. 31-34. Most, if not all States, however, have longstanding constitutional limitations on the amount of their indebtedness. *See id.* at 1250. As a consequence, those important governmental programs which require major capital spending (such as universities, turnpike and housing authorities to name just a few) must be carried out by authorities and corporations which are nominally independent of the State executive department. Many of these entities do not, however, resemble in any sense local government entities which are not entitled to Eleventh Amendment immunity. To suggest that such entities are not entitled to Eleventh Amendment immunity simply because the State is technically not liable for any judgment is to ignore that they perform important programs on behalf of the State and that any federal court judgment will affect the entity in its performance of these functions. In the same way that a money judgment against the State would affect the State's ability to serve the citizenry, a money judgment against a technically off-budget state entity likewise affects its ability to serve.

The court of appeals' conclusion that state liability is the most important factor in determining whether an entity is an arm of the state has scant support in this Court's cases. *Lincoln County* contains no such assertion. *See* 133 U.S. at 530-33. Moreover, *Mt. Healthy* held that a school board "is more like a county or city than it is like an arm of the State" notwithstanding that it "receive[d] a significant amount of money from the State." 429 U.S. at 280. As *Mt. Healthy* demonstrates, whether a State is financially responsible for an entity frequently does



not answer the question of whether it is an arm of the state.[2]

While in this case it is clear the Ninth Circuit's decision relied solely on the indemnification agreement, the court applied its five-part test for determining whether an entity is an arm of the state. This test asks, in addition to whether the State would be liable for a money judgment, "'whether the entity performs central governmental functions,'" "'whether the entity may sue or be sued,'" "'whether the entity has power to take property in its own name or only the name of the state,'" and "'the corporate status of the entity.'" Pet. App. 6a-7a (quoting *ITSI TV Prods. v. Agricultural Ass'ns*, 3 F.3d 1289, 1292 (9th Cir. 1993)).

This test is too indeterminate to provide guidance to state officials in structuring governmental operations. For example, are the factors other than whether the State would be liable (which the Ninth Circuit erroneously deems to be the "most important," Pet. App. 7a), equally weighted? If two factors support arm of the state status and two do not, is the entity an arm of the state or not?[3]

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[2] *Hess* is not to the contrary. That case involved a bi-state entity which by definition was answerable to more than one State and thus was presumptively not within the scope of the Eleventh Amendment. *See* 115 S.Ct. at 404; *see also id.* at 400 ("Bistate entities occupy a significantly different position in our federal system than do the States themselves.").

[3] Numerous lower federal courts continue to use similar multi-factor tests, which suffer from the same flaws of indeterminacy and reliance on criteria lacking in probative value. *See, e.g., PYCA Indus., Inc. v. Harrison County Waste Water Management Dist.*, 81 F.3d 1412, 1416-17 (5th Cir. 1996); *Treleven v. University of Minnesota*, 73 F.3d 816, 818 (8th Cir. 1996); *Iowa Comprehensive Petroleum Underground*

Of equal importance, these remaining factors are of little probative value in determining whether an entity is an arm of the state. Indeed, the Ninth Circuit's test is all the more remarkable for its failure to ask the most fundamental question—whether the entity is "politically accountable to the State, and by extension, to the electorate" at the level of statewide governance. *Hess*, 115 S.Ct. at 410-11 (O'Connor, J., dissenting, joined by Rehnquist, C.J., Scalia and Thomas, JJ.).

For example, the Ninth Circuit's second factor is "whether the entity performs central governmental functions." Pet. App. 6a. But other than resorting to tradition, which may well vary from State to State, there are no judicially manageable standards for making this determination. Moreover, even an analysis which looks to tradition to determine whether a function is one performed by central as opposed to local governments inherently conflicts with the notion of the States serving as the laboratories for social and economic experimentation which respond to changing conditions. *Cf. Garcia v. San Antonio Metro. Trans. Auth.*, 469 U.S. 528, 545-47 (1985) (citing *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)); *see also id.* at 546 (quoting *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204, 226 (1821) ("The science of government . . . is the science of experiment.")). As Justice Black observed, "The genius of our government provides that, within

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***Storage Tank Fund Bd. v. Amoco Oil Co.*, 883 F. Supp. 403, 413-22 (N.D. Iowa 1995); *New England Multi-Unit Housing Laundry Ass'n v. Rhode Island Housing & Mortgage Finance Corp.*, 893 F. Supp. 1180, 1188-90 (D.R.I. 1995) (applying "a seven-part test that is not exhaustive").**



the sphere of constitutional action, the people—acting not through the courts but through their elected representatives—have the power to determine as conditions demand, what services and functions the public welfare requires." *Helvering v. Gerhardt*, 304 U.S. 405, 427 (1938) (Black, J., concurring). The people, acting through their legislatures, surely have the attendant power to decide whether functions traditionally deemed to be local should be conducted at the state level.

Two of the remaining factors—whether the entity may sue or be sued and whether the entity holds property in its own name—are to a large degree simply surrogates for the fifth factor, whether the entity has corporate status. *See* Pet. App. 6a-7a. But these powers are also essential attributes of sovereignty. As the Court has long recognized, "[e]very sovereign State is of necessity a body politic, or artificial person, and as such capable of making contracts and holding property, both real and personal." *Cotton v. United States*, 52 U.S. (11 How.) 229, 231 (1850). And as the Court has further acknowledged, "[a]lthough . . . a sovereign . . . may not be sued, . . . as a corporation or body politic [it] may bring suits to enforce [its] contracts and protect [its] property." *Id.*

That the State, in creating an entity, bestows upon that entity the power to sue, to hold property in its own name, or corporate status thus does not demonstrate that it is not an arm of the state. Without such powers, a state entity could not accomplish its purpose. Moreover, a State might very well enact legislation granting a state entity the power to sue or corporate status. *See, e.g., Florida Dept. of Health*, 450 U.S. at 149 (upholding Eleventh Amendment immunity notwithstanding that agency had "the

capacity to 'sue and be sued'" and was a "'body corporate'") (quoting Fla. Stat. § 402.34 (1979)). Such a grant of authority thus does not establish the entity's legal independence from the State. Indeed, the federal government has created numerous corporations to further important governmental objectives which are entitled to sovereign immunity absent congressional waiver. *See FDIC v. Meyer*, 114 S.Ct. 996 (1994); *see also Lebron v. National R.R. Passenger Corp.*, 115 S.Ct. 961 (1995).

In *Meyer*, the FDIC's organic act granted the agency corporate status, with the attendant power "to sue and be sued." 114 S.Ct. at 1000 & n.3 (citations omitted). The Court nonetheless presumed that the FDIC was entitled to the United States' sovereign immunity and conducted a searching inquiry into the nature of the claim to determine whether it fell within the ambit of the Federal Tort Claims Act. *See id.* at 1000-1002. The *Meyer* Court ultimately concluded that "the United States simply has not rendered itself liable under" the FTCA for Meyer's claims, *id.* at 1001, but that the "sue and be sued" clause effected a broad waiver of the United States' sovereign immunity. *Id.* at 1002-4. It is noteworthy, however, that the Court did not deem the clause and the FDIC's corporate status as establishing that the entity was independent of the United States. Instead, the Court's analysis recognized that the FDIC was an instrumentality of the United States whose sovereign immunity was waived as a matter of legislative judgment. *See id.*; *cf. Lebron*, 115 S.Ct. at 974-75 ("[W]here . . . the Government creates a corporation by special law, for the furtherance of governmental objectives, and retains for itself permanent authority to appoint a majority of the directors of that corporation, the corporation is part of the Government for purposes of the First Amendment.").[4]



To be sure, in *Lincoln County v. Luning* the Court relied on the corporate status of local government subdivisions to hold that they were not "a part of the state" for purposes of the Eleventh Amendment. 133 U.S. at 530-31. A local government entity, however, is generally subject to state control only in the most indirect sense. *See Hess*, 115 S.Ct. at 411 (O'Connor, J., dissenting). Rather, its officers are commonly elected by the voters within the entity's geographical boundaries, thus establishing that the entity is, as a matter of political organization, directly accountable at the local rather than state level. *Lincoln County* clearly did not hold that a government entity's corporate status removes it from the protection of the Eleventh Amendment even when it remains directly accountable to the State through the power to appoint its officials. *Cf. Lebron*, 115 S.Ct. at 973-74.

As the foregoing demonstrates, the various factors employed by the Ninth Circuit have no probative value in determining whether an entity is an arm of the state. Rather, the determination of whether a state entity "is more like a county or city than it is like an arm of the State," *Mt. Healthy*, 429 U.S. at 280-81, should be based on political control of the entity.

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[4] Moreover, that a State grants an entity the authority to sue without the approval of the State's attorney general is no more probative of whether an entity is independent of a State. Both the Federal Trade Commission and the Federal Election Commission are obviously arms of the Federal Government even though they possess substantial independent litigating authority. *See* 15 U.S.C. § 56(a) (FTC Act); *Federal Election Comm'n v. NRA Political Victory Fund*, 115 S.Ct. 537, 541 (1994).

As Justice O'Connor has explained, "the proper question is whether the State possesses sufficient *control* over an entity performing governmental functions that the entity may properly be called an extension of the State itself." *Hess*, 115 S.Ct. at 410 (O'Connor, J., dissenting).

This test takes into account the treasury factor for "[i]t will be a rare case indeed where the state treasury foots the bill for an entity's wrongs but fails to exercise a healthy degree of oversight over that entity." *Id.* at 411. Moreover, it properly affords Eleventh Amendment immunity to the many entities which have independent budgets but which are fully subject to direct state control and thus cannot be fairly characterized as "more like a county or city than . . . an arm of the State." *Mt. Healthy*, 429 U.S. at 280-81. A test which focuses on political control of the entity is thus necessary to "assur[e] state governments the critical flexibility in internal governance that is essential to sovereign authority." *Hess*, 115 S.Ct. at 411 (O'Connor, J., dissenting).

The *Hess* majority's concern that determining whether a State controls an entity "can be a 'perilous inquiry,'" or "'an uncertain and unreliable exercise,'" 115 S.Ct. at 404 (quoting Note, 92 Colum. L. Rev. at 1284), is simply not implicated where, as here, an entity has only one rather than "multiple creator-controllers." *Id.* There is nothing "'uncertain and unreliable'" in such an approach, particularly if it is not extended beyond the simple and straightforward question of who appoints a majority of the entity's officials. Indeed, it is far less difficult



than many other inquiries routinely undertaken by the federal courts.[8]

When analyzed under the proper criterion, it is clear that the University of California is an arm of the State of California. Created by the California Constitution, the University is governed by a Board of Regents whose members comprise such senior state officials as the Governor, the Lieutenant Governor, the Speaker of the Assembly, and the Superintendent of Public Instruction. Cal. Const. Art. IX, § 9(a). In addition, the Board includes eighteen members "appointed by the Governor and approved by the Senate." *Id.* While the Board of Regents has substantial autonomy, "the State retains a measure of control" through the appointment power. *See Vaughn v. Regents*, 504 F. Supp. 1349, 1353 (E.D. Cal. 1981). Numerous decisions have thus long recognized that the University is "a constitutional department . . . of the state government." *Hamilton v. Regents*, 293 U.S. 245, 257 (1934) (citations omitted); *see also Thompson*, 885 F.2d at 1443; *BV Engineering*, 858 F.2d at 1395; *Vaughn*, 504 F. Supp. at 1353; *Ishimatsu v. Regents*, 72 Cal. Rptr. 756, 762-63 (Ct. App. 1968). And as the California Attorney General has explained, the University "is a constitutional corporation or department and constitutes a branch of the state government equal and coordinate with the legislature, the judiciary and the executive." 30 Ops. Cal. Atty. Gen. 162, 166 (1957). As such, the Uni-

[8] Numerous federal entities commonly act with considerable autonomy from both congressional and executive oversight. *See, e.g., Lebron*, 115 S.Ct. at 972. But because their officials are appointed by the federal government, there is no dispute that these entities are arms of the federal government.

versity is an arm of the state and is therefore entitled to Eleventh Amendment immunity in this case.

## CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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